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Legislative Counsel

OLC 78-0399/N

29 SEP 1978

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Jim:

In response to your request of 22 September 1978 for views on the Department of State's proposed report on problems raised by S. 2525 with respect to the Government's anti-terrorism capabilities and requirements, it is our view that such a report should not be forwarded to the Congress at this time.

As you are aware, the Administration's Charter Legislation Working Group, with representatives from OMB and the Intelligence Community components, is engaged in a comprehensive review of the charter legislation intended to develop Administration position on all provisions of S.2525. This review will, of necessity, involve consideration of the legislation's impact on the Government's anti-terrorism capabilities.

The Department of State's proposed report to Senator Stevenson is based upon the views of the Office for Combatting Terrorism which have been transmitted to the Charter Working Group and will be taken into consideration in that forum. Accordingly, we believe the appropriate course of action is to forego providing Congress with separate views on particular aspects of the charter legislation until such time as the Administration review is completed and comprehensive, fully-coordinated recommendations are developed.

It is our view that an appropriate response from the Department of State to Senator Stevenson would be a letter reflecting these considerations and expressing no further

views in this regard. For the reasons stated above, we cannot concur in sending the Department's proposed report to the Congress.

Sincerely,

[Redacted Signature Box]

Frederick P. Hitz
Frederick P. Hitz

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Distribution:

Original - Addressee

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EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

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WASHINGTON, D.C. 20503

September 22, 1978

OLC #78-399/M

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

National Security Council
Department of Justice
Department of Transportation
Department of the Treasury
Department of Defense
Central Intelligence Agency

SUBJECT: State proposed report on problems raised by
S. 2525 with respect to Terrorism.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

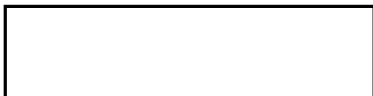
A response to this request for your views is needed no later than C.O.B. Tuesday, September 26, 1978. Phone comments will be accepted.

Questions should be referred to Dan Taft (395-3285) or to Tracey Cole (395-4710), the legislative analyst in this office.

Ronald K. Peterson

RONALD K. PETERSON for
Assistant Director for
Legislative Reference

Enclosures



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DEPARTMENT OF STATE

Washington D C 20520

September 20, 1978

Dear Mr. Chairman:

On August 9, 1978, I testified before your Committee concerning S.2236, an act to combat international terrorism. During the course of the hearing, Senator Stevenson asked whether there had been an interagency review of the effect of S.2525, the National Intelligence Reorganization and Reform Act of 1978, on the anti-terrorism capabilities of the U.S. Government. In response to this request, I have asked the Intelligence Community to carry out such a review. The attached paper is its coordinated response.

In addition, Senator Wallop asked during the hearing whether the prohibition in Section 134 in S.2525 on assassinations would cause problems in carrying out an overseas hostage rescue mission. This issue is addressed in paragraph six of the attached review.

I hope this information will be of assistance to your Committee.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report.

Sincerely,


Anthony C.E. Quainton
Director

Office for Combatting Terrorism

Enclosure:
As stated

The Honorable
Birch Bayh, Chairman,
Senate Select Committee on Intelligence,
United States Senate.

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Enclosure
8 September 1978

PROBLEMS RAISED BY S.2525
WITH RESPECT TO TERRORISM

1. S.2525 poses two rather fundamental problems as it applies to the government's programs relating to international terrorism. First, the restrictions in the bill appear designed to deal primarily with traditional concepts of foreign intelligence collection; they are unduly restrictive in the context of specific responses to terrorist incidents or measures taken to prevent terrorist attacks. Secondly, the bill apparently fails to recognize that the definition of international terrorism encompasses specific criminal acts which may be investigated and prosecuted as such. The following comments on specific sections of the bill, while not exhaustive, illustrate these problems.

2. Section 104(21) (page 16) defines international terrorism in terms very similar to Executive Order 12036. However, it omits from the definition of international terrorism acts which appear intended to endanger a protectee of the Secret Service. Inclusion of this concept may be extremely important, particularly in emphasizing that the sharing of information by the intelligence community with the Secret Service, implied in Section 232, is permitted when the acts of foreign-directed individuals or of individuals abroad may threaten the President or other Secret Service protectees.

3. Section 123 (pp.41-44) grants very broad authority to the General Accounting Office to have access to records of agencies in the intelligence community. Similarly, section 151 (page 77) grants very broad access to the Intelligence Oversight Board. Where the agency records involved concern a specific investigation of a criminal act by terrorists this access may risk undue interference with a pending prosecution. Access might also conflict with the prohibitions in Rule 6(e) of the Federal Rules of Criminal Procedure against disclosure of Grand Jury materials to anyone other than attorneys for the government connected with the prosecution.

4. The restrictions in section 132 (pp. 51-54) may prove unduly stringent when applied to the investigation of groups engaged in terrorist acts. For example, an undercover agent who has infiltrated such a group may be obligated to distribute its publications, either here or abroad, to maintain his cover in the organization. Similarly, if the terrorist group purports to act in the name of religion or to be a student movement, it may be essential to assume a religious or academic cover in order to investigate the terrorist acts of the group. Recognizing the sensitivity of these matters, it may be necessary to impose controls, but an absolute bar on these activities may severely hamper our ability to investigate terrorists and prevent specific acts of violence. Likewise, if the restriction on the use of permanent resident aliens abroad for "clandestine intelligence activity" is read to include the investigation of terrorist groups the ability to effectively penetrate such groups may be lost.

5. It is not clear whether a military unit ordered by the President to take counterterrorism action would fall within the definition of intelligence community. See Section 104(16) (M). If it does several provisions of sections 132 and 133 may pose problems in the event the President should call for a military action against terrorists in the nature of an Entebbe raid. For example, section 132(c) (pp. 53-54) bars the use of United States personnel in circumstances involving risk unless they volunteer. In a military action it may be necessary to order certain U.S. personnel abroad to perform tasks for which they are uniquely suited, with or without their consent. Similarly, the exigencies of a military effort to respond to a terrorist incident abroad may require on-the-scene use of experienced personnel of intelligence community agencies, without an opportunity to comply with the detailed notice and approval requirements of section 133 (pp. 55-57). Similar problems are presented by the requirements in section 137(b) (pp. 65-66) that prior notification and Presidential approval precede encouraging another country to engage in military strikes in response to terrorist incidents.

6. The prohibition in section 134 on assassination does not define the term as such but does refer to the killing of foreign officials because of their actions. This language would be broad enough to cover the shooting of an

airport official in the course of rescuing a hijacked plane or the killing of an official who is himself engaged in a terrorist act. We doubt that this is the intent but the language should be clarified in the context of response to terrorist situations.

7. Section 211 (p. 102) sets forth broad principles apparently limiting collection against not only citizens and other "U.S. persons" but also against any foreign person within the U.S., apparently without regard to his activities or affiliations. This is confusing in view of other provisions of Title II which impose special limits on collection only when U.S. citizenship or other "U.S. persons" status is involved.

8. Section 211 (p. 102) specifies that it is the exclusive authority for counterterrorism activities, thus including not only intelligence collection but prevention, response, criminal investigation and prosecution. As noted at the outset, this poses problems because the restrictions in Title II are written primarily with intelligence collection in mind. Thus, section 213 (pp. 104-105) permits the collection of intelligence on terrorist activities of a United States person only if the person is "reasonably believed" to be engaged in espionage or other "clandestine intelligence activity" which involves terrorism. Section 225 (pp. 114-115) imposes similar restrictions with respect to foreign persons. Terrorists by their very nature, however, are more often involved in overt criminal activity rather than "clandestine" activity. Surely it is not the intent of the bill to prohibit investigation of terrorists whose actions are overt. The "reasonable belief" language of the standards may also pose problems in the terrorism context. Frequently there will be no doubt at all that terrorist action is taking place and that a particular group is claiming credit. There may not be sufficient information as to the identity of the particular members of the group, however, and until investigation identifies them, a reasonable belief standard as to a given individual may not be met. The bill would appear to foreclose such an identifying investigation, although we doubt this is intended.

9. Section 215 (pp. 106-107) generally requires written findings of the Attorney General before information may be requested about a United States person from federal, state or local agencies or physical surveillance may be undertaken.

This restriction would seem to be excessive in the context of investigating a terrorist act which has taken place or in preparing to protect the President or other officials protected by Secret Service from terrorist acts. Presently, for example, the Secret Service will make inquiry of federal agencies and local authorities in a city to which the President will be travelling in order to identify individuals who pose a threat of harm. We see no reason why the Attorney General's permission should have to be secured to undertake this normal protective function. Nor should permission be necessary to maintain physical surveillance of crowds surrounding the President. Again, we doubt that this was intended by the bill but the language appears to encompass such protective activities.

10. Section 216 (pp. 107-108) establishes time limitations on the collection of intelligence and requires periodic review. Without questioning the appropriateness of this restriction in the context of general intelligence collection, it seems unduly burdensome when applied to the investigation of a specific terrorist activity which is designed primarily to identify, apprehend and prosecute the terrorists.

11. Section 232(d) (pp. 118-119) limits the dissemination of counterterrorism information. It makes no provision for disseminating such information to courts or defense attorneys in connection with a prosecution. Nor would it appear to permit dissemination to a body, such as the Working Group on Terrorism, which has a general interest in the subject and a need for information for planning and analysis but may not have "a direct interest in the particular information." No provision is made for disseminating information to non-U.S. persons who are potential victims of terrorism. In order to prevent terrorism effectively, broader dissemination must be authorized.

12. We have not undertaken to review each provision of S.2525 in detail but the above discussion illustrates our general concern that the bill does not deal adequately with the protective and responsive aspects of our mission against terrorism nor does it focus adequately on the investigative and prosecutive functions of federal agencies in this regard. It may well be that these are sufficiently unique that they must be addressed in a separate context rather than being incorporated in a bill which is focused on intelligence collection.